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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

E. L. FISHER and ANNA MARGARET FISHER,
husband and wife,

Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF HIGHWAYS,
a corporation, and CHARLES L. MILLER,
West Virginia Commissioner of Highways,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

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ISSUES PRESENTED FOR REVIEW

1. The petitioners were deprived of real property more than 12 years ago; and the ruling of the West Virginia Supreme Court of Appeals, made under color of West Virginia Code 56-6-12, denied petitioners the rights of due process and equal protection of the laws and receipt of just compensation for their property as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 3 of the Constitution of the State of West Virginia.

2. The West Virginia Supreme Court has fashioned a standard of jury qualifications which ignores and invalidates the universally recognized principle that there must be evidence of bias or prejudice as to a venireman challenged before he may be struck for cause.

3. The West Virginia Supreme Court has fashioned in the instant case the

most restrictive standard of jury qualification to be found in the United States; and as a result petitioners will be forever denied just compensation for their real property taken for public use by respondents more than 12 years ago, as quaranteed them by our Constitution.

PARTIES TO THE PROCEEDING

Petitioners

E. L. Fisher and Anna Margaret Fisher,
husband and wife

Respondents

West Virginia Department of Highways,
a corporation, and Charles L. Miller,
West Virginia Commissioner of Highways

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WEST VIRGINIA SUPREME COURT OF APPEALS

STATEMENT OF JURISDICTION

On March 22, 1982, the Supreme Court of Appeals of West Virginia ordered that the verdict of the jury of the Circuit Court of Braxton County

rendered September 1980, awarding unto petitioners the sum of Eight Hundred Forty-one Thousand Nine Hundred Dollars ($841,900.00) as just compensation for property taken by respondent on 29th day of April, 1970, by the right of eminent domain and the order entered thereon by the Circuit Court of Braxton County, West Virginia be reversed and remanded for new trial. (1a-29a.)[1]

A timely petition for rehearing, filed with the Supreme Court of Appeals of West Virginia, was denied on May 27, 1982. (1b-2b.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

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[1]The reference to "R" followed by a number is to the record of the trial court, followed by the page number. References to the appendices are indicated by a number followed by a small letter. A copy of the portion of the trial court record pertinent to jury selection will be lodged with the Clerk of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statutes which are involved in this case are set forth in Appendix C, infra:

U.S. Const., Amend. V
U.S. Const., Amend. XIV, §1
W. Va. Const., Art. III, §9
W. Va. Code § 54-1-1
W. Va. Code § 54-2-1
W. Va. Code § 54-2-10
W. Va. Code § 56-6-12

STATEMENT OF THE CASE

The petitioners are both life-long residents of Braxton County, West Virginia, and are in their seventies. The petitioner, E. L. Fisher, M.D., is a physician actively practicing medicine in Braxton County and has been engaged in his medical practice and community activities for almost 50 years. Braxton is an agricultural county, with a population of approximately 14,000 residents.

The petitioners are the owners of a tract of land containing in excess of 500 acres, situate in Braxton County, West Virginia, operated as a cattle farm. By order of the Circuit Court of Braxton County, dated April 29, 1970, the West Virginia Department of Highways acquired by the right of eminent domain, rights-of-way and permanent easements over, across and through 79.06 acres of petitioners' land, and a temporary easement over an additional 1.13 acres for construction of Interstate 79. Prior to this taking, petitioners' land fronted along U.S. Route 19 and W. Va. Route 4 (formerly the major north-south route of travel through West Virginia) for more than a mile. It is along this portion of petitioners' property that the limited access interstate highway is constructed.

On April 29, 1970, when it was given the right of access to petitioners' property, the West Virginia Department of Highways deposited with the Circuit Court of Braxton County,

West Virginia the sum of Thirty-eight Thousand Five Hundred Dollars ($38,500.00) as just compensation for the property and easements. On August 19, 1970, a Commissioner's hearing was held and petitioners were awarded Eighty-nine Thousand Dollars ($89,000.00) for the rights of way and easements taken. Exceptions to the Commissioner's award were filed by both these petitioners and the West Virginia Department of Highways. Ten years later a jury of 12 freeholders found Eight Hundred Forty-one Thousand Nine Hundred Dollars ($841,900.00) to be just compensation for the property and easements taken.

On August 4, 1980, a jury was selected "* * * free from exception * * *" by either counsel for the Department of Highways or these petitioners. (R. 6.) After being sworn by the trial court, the jury was dismissed and directed to return to the courtroom on September 10, 1980, for the taking of evidence and trial.

On September 10, 1980, before the taking of any evidence, a mistrial was declared, the jury was dismissed, and the court clerk was directed by the trial court to summons a new jury venire on September 11, 1980, for the purpose of selecting a jury.

On Thursday, September 11, 1980, the clerk of the circuit court called a panel of 20 jurors. It is important to note that 16 of the jurors chosen for the August 4, 1980, panel from which a jury was selected and found by counsel for the petitioners and counsel for the Department of Highways to be "* * * free from exception * * **" (R. 6) were also chosen as prospective jurors on September 11, 1980.[2] Upon voir dire by the court, it was determined that a number of the prospective jurors were acquainted with the petitioners and/or one or more of the value witnesses the

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[2]Copies of the jury lists obtained from the trial court file are lodged with the Clerk of this Court.

counsel for petitioners advised the court would be called. Each of the prospective jurors answered without hesitation that his/her acquaintance with the petitioners and/or petitioners' witness would not cause him/her bias or prejudice, and he/she would be able to base a decision solely on the evidence, instructions of the court, argument of counsel and consultation with fellow jurors (R. 19-54). Upon completion of the trial court's voir dire, counsel for the Department of Highways moved "* * * that the entire jury venire be challenged for cause and dismissed * * *" (R. 57). The trial court denied the motion of counsel for the Department of Highways, ruling "* * * there is not showing that the jury would be prejudice * * *" (R. 61). The trial court further advised Department of Highways' counsel that he would be afforded an opportunity to establish cause for strikes or dismissal of some or all of the jurors from the panel on further voir dire (R. 61). Upon motion of counsel for petitioners, individual voir dire of

each of the prospective jurors was held in chambers. During the individual voir dire, each of the veniremen interviewed by counsel for the petitioners and respondents answered without hesitation that he/she could act fairly and receive the evidence and make a decision based upon the evidence and instructions of the trial court (R. 66-152).

Upon conclusion of the individual voir dire, counsel for the Highways Department first advised the trial court that he had "* * * nothing at this time." (R. 152.) Then, almost as an afterthought, Department of Highways counsel said "For the record, let me make my former motion." (R. 152.) The trial court then overruled this "* * * former motion" and the jury was struck and evidence was presented.

At the conclusion of all of the evidence presented by petitioners and the Department of Highways, a view of the lands of petitioners, argument of counsel and instructions of the trial

court, the jury found the sum of Eight Hundred Forty-one Thousand Nine Hundred Dollars ($841,900.00) to be just compensation due the petitioners for the land acquired by the Highways Department.

The Highways Department made objection and exception to the verdict and filed a petition for writ of error and supersedeas with the West Virginia Supreme Court of Appeals.

On March 22, 1982, the West Virginia Supreme Court of Appeals reversed the judgment of the Circuit Court of Braxton County and remanded this matter for new trial on the grounds that "* * * a likelihood of bias or prejudice on the part of the jury existed sufficient to require that the verdict of the jury be set aside and a new trial awarded." (28a.) The West Virginia Supreme Court further found "* * * no reversible error * * * with respect to the instructions challenged by the appellant in this appeal, and all

other errors asserted by the appellant are without merit." (29a.)

The petitioners herein filed a timely petition for rehearing on April 20, 1982, in which the federal questions presented now for review were raised. The West Virginia Supreme Court, on May 27, 1982, ignored and failed to address these issues, and denied petitioners' rehearing petition without comment. (30a.)

ARGUMENT AND REASONS FOR ALLOWING WRIT

The West Virginia Supreme Court of Appeals ignored the great care taken by the trial court to empanel a jury free from bias or prejudice. It is undisputed that 13 of the 20 prospective jurors were "acquainted" with the petitioners E. L. Fisher and/or Anna Margaret Fisher. A juror, however, is not disqualified from sitting in a matter because he is an "acquaintance" of one of the litigants. West Virginia Code § 56-6-12 establishes the method to

be followed in an instance such as this; and allows either party to examine

> "* * * on oath any person who is called as a juror * * * to know whether he is a qualified juror, or is related to either party, or has any interest in the cause, or is sensible of any bias or prejudice * * *." (6c.)

The trial court acknowledged this provision of the West Virginia Code when it overruled the Department of Highways' motion that "* * * the entire jury venire be challenged for cause and dismissed * * *" (R. 57) and proceeded on individual voir dire. The conduct of such an individual voir dire of the entire jury and not just those expressing an acquaintance with the appellees and/or their appraisal witnesses was welcomed by counsel for the Department of Highways, who declared that "* * * it would help to get a free and impartial jury." (R. 61.)

No restrictions were placed upon counsel for the Department of Highways; and each of the prospective jurors was queried not only with regard to possible bias or prejudice for petitioners, but also as to any feeling they had with regard to the eminent domain rights of the Highways Department.

This type of comprehensive, recorded jury voir dire has been declared a reliable method of determining whether a fair and impartial jury can be empaneled "* * * pursuant to procedures, practices and principles developed by the common law since the reign of Henry II." United States v. Haldeman, 559 F.2d 31, 64 n. 46 (C.A., D.C. 1976) cert. denied.

When queried, the jurors spoke candidly of any "acquaintance" or relationship they might have with either of the petitioners and/or their witnesses. As an example of the candor and good faith exhibited by the jury venire during individual voir dire and

the broad interpretation placed on them of the term "personal acquaintance," petitioners would point out to this Court statements made by prospective juror eight. She referred to a "personal acquaintance" with Russell Stobbs, one of the attorneys for the State. Upon voir dire, it was revealed that this "personal acquaintance" resulted from her interview by Mr. Stobbs (one of the trial counsel for the Highways Department) as a possible witness in a matter which had subsequently been dismissed (R. 103).

It is readily acknowledged that the Department of Highways, as well as the petitioners, was entitled to a trial by a panel of indifferent and impartial jurors. The "common sense" standard of jury qualification as espoused by our courts and found in Irvin v. Dowd, 366 U.S. 717, 81 S. Ct. 1639, 1642, 6 L. Ed. 2d 751 (1961), recognizes, however, that to be indifferent and impartial "[i]t is not required * * * that the jurors be totally ignorant of the facts and issues

involved." Applying this "common sense" standard to the instant case, it was not necessary that to be impartial the prospective jurors be hermits or totally unfamiliar with the petitioners and/or appraisal witnesses. This is true especially in light of the fact that Braxton County has a total population of approximately 14,000 where the petitioner, E. L. Fisher, M.D., was born and has practiced medicine for more than 40 years; and the appraisal witness Hefner is a native and has been an employee at one of the county's two banks for more than 20 years; and the appraisal witness Kyer is a native and has been engaged in the insurance business for more than 20 years.

Most law with regard to the striking of a juror for cause is found in criminal trial appeals. A 1974 appeal to the West Virginia Supreme Court of Appeals contains an assignment of error analogous to the assignment of error that Court asserted was reason to reverse and remand this case for new

trial. The West Virginia Supreme Court of Appeals in State v. Charlot, ___ W. Va. ___, 206 S.E.2d 908 (1974), held that a defendant was not entitled to have an entire jury venire struck for cause, although 13 of the 20 had served in trials of cases involving similar subject matter and identical witnesses. The West Virginia Court in Charlot, acknowledged the well-established principles of law regarding the issue of bias and prejudice in jury qualification, and held that:

> "The true test to be applied with regard to the qualification of a juror is whether a juror can, without bias or prejudice, return a verdict based on the evidence and the courts' instructions."

Defendants prosecuted in one of the most widely publicized and followed events in our nation's recent past--the alleged cover-up in the "Watergate" affair--asserted on appeal that they were denied a fair trial because the jury was not sufficiently impartial.

The District Appeals Court, in response to this assignment of error, found that:

> "* * * a defendant who claims he was denied a fair trial because the jury was not sufficiently 'indifferent' generally must sustain that claim 'not as a matter of speculation but as a demonstrable reality.' United States ex rel. Darcy v. Handy, 351 U.S. 454, 462, 76 S. Ct. 965, 970, 100 L. Ed. 1339 (1956), quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 281, 63 S. Ct. 236, 87 L. Ed. 268 (1942). This demonstration can be made only by reference to the voir dire * * *." United States v. Haldeman, 559 F.2d 31, 60 (C.A., D.C. 1976), cert. denied, 97 S. Ct. 2641. (Emphasis added.)

The Department of Highways had a burden in the instant case to prove that it was denied a fair trial because the jury was not impartial or sufficiently indifferent. No indication of bias or prejudice can even remotely be inferred from a review of either the voir dire conducted in open court by the trial

judge or the individual voir dire conducted out of the presence of the other veniremen. From the actions of counsel for the Department of Highways it is evident he realized no bias or prejudice was shown upon the part of the jury venire which would establish grounds for the striking of one or all of them for cause. First, counsel for the Department of Highways made no motion to strike for cause any individual juror upon the conclusion of his/her voir dire or upon the conclusion of all of the voir dire. He did not even explore the possiblity of bias or prejudice with several of the jurors who indicated an acquaintance with appraisal witnesses. (R. 132, 137, 150.) Secondly, counsel for the Department of Highways, as an afterthought, made only a pro forma motion to strike the entire jury panel for cause upon conclusion of the individual voir dire, as follows:

"The Court: Is there anything further, any motions or anything?

"Mr. Hunt: I have nothing at this time.

"The Court: How long do you anticipate you will need to consider your strikes?

"Mr. Hunt: For the record let me make my former motion.

"The Court: Go ahead.

"Mr. Hunt: And I would anticipate the same ruling.

"The Court: Okay, the record will show that the State renewed its motion to dismiss this panel and change the venue and the Court, upon due deliberation and consideration was of the opinion to and did overrule the motion."

This exchange, having occured after a meaningful and unrestricted individual voir dire of the entire jury venire, without question substantiates the

contention of the petitioners that no bias or prejudice was exhibited by the venire. The trial court, having observed the demeanor and actions of each prospective juror upon voir dire, most assuredly did not abuse its discretion in denying the motion to dismiss the entire jury venire. In no other jurisdiction can such an extreme and conservative test be found for juror qualification as the one fashioned by the West Virginia Supreme Court of Appeals in the instant proceeding. It ignored the well-established, common sense standard of jury qualification begun with the reign of Henry II, almost a thousand years ago.

The West Virginia Supreme Court of Appeals found no fault with the evidence presented to the jury or instructions of the trial court. Its opinion further makes no sound finding or showing that the testimony of any prospective juror was indicative of bias or prejudice. It abrogated the heretofore universal standard of jury qualification; and

fashioned for this specific case a rule that "* * * although all prospective jurors stated that they could return a verdict free from bias or prejudice * * * a likelihood of bias or prejudice existed * * *." (28a.) Further indicative of the fashioning of this rule of law to fit the instant case is the qualification by the West Virginia Supreme Court of Appeals that this likelihood exists "[i]n an eminent domain proceeding * * *." (28a.)

Braxton is a rural, sparsely populated county. This factor, coupled with the professions of the petitioner, E. L. Fisher, M.D., and the appraisal witnesses makes it impossible to empanel a jury for trial of this matter under the standard now imposed by the West Virginia Supreme Court. This fact was acknowledged by counsel for the Department of Highways at the time of his motion to strike the entire jury venire, when he stated:

"* * * a future jury that would be empaneled in this county, with the longstanding reputation of Dr. Fisher as a practicing physician in this county, * * * would not be of any better situation, and there would probably be the same knowledge."

West Virginia Code § 54-2-1 places jurisdiction for eminent domain proceedings in "* * * the county in which the estate is situated * * *." Our Code further provides that when either party properly demands it "* * * the question of just compensation and any damages to be paid, (shall) be ascertained by a jury, in which case a jury of twelve freeholders shall be selected and empaneled * * *." West Virginia Code § 54-2-10.

The Fifth Amendment to the United States Constitution decrees that private property shall not be taken for public use without payment of just compensation.

The West Virginia Constitution, Article III, Section 9, goes one step further in providing that "* * * when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders."

The Fourteenth Amendment to the United States Constitution dictates in Section 1 that no State shall "* * * make or enforce any law which shall abridge the privileges * * * of citizens of the United States * * * nor * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The ruling of the West Virginia Supreme Court in the instant case, at first glance appears but a slight deviation from prior procedure; but it is a deviation which will deprive the petitioners of their guarantees to just compensation and equal protection of the laws. While the West Virginia Supreme

Court most surely limited the application of its new standard to the instant factual situation,

> "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure * * *." Boyd v. United States, 116 U.S. 616, 635 (1885), quoted in Monongahela Navigation Co. v. United States, 148 U.S. 312, 37 L. Ed. 463, 467, 13 S. Ct. 622 (1892).

The petitioners have been denied protection guaranteed under the United States Constitution and the West Virginia Constitution against unlawful government encroachment upon their inalienable rights. Though the right to condemn private land for public use is constitutionally provided for, it is a well-settled principle of universal law that the right to just compensation is an incident to the exercise of that power. The one is so inseparably connected with the other that they are

said to exist, not as separate and distinct principles, but as parts of one and the same principle. Monongahela Navigation Company v. United States, 148 U.S. 312, 37 L. Ed. 463, 13 S. Ct. 622 (1892), (hereafter Monongahela). Petitioners herein were deprived of their property more than 12 years ago and have not yet received just compensation therefor. The requirement that just compensation be made to the landowner is a limitation set out in the United States Constitution, Fifth Amendment, and the West Virginia Constitution, Article 3, Section 9, as a protective mechanism to assure that government cannot trespass upon the inalienable rights of persons and property which, by the Declaration of Independence, are vested in citizens of the United States. Monongahela. This requirement of just compensation does not prevent the government from taking land for the public good, but it should prevent government and the public from burdening one individual beyond his fair share. Petitioners strongly assert that 12 years is an unreasonable period

to delay payment and is a burden so great that it amounts to disregard of the requirement that just compensation be made. Petitioners' burden is not limited to the past 12 years of deprivation without compensation. The extent of the injury to the petitioners is not yet ascertained due to the West Virginia Supreme Court of Appeals' decision, which amounts to a continuing disregard of constitutional mandates and effectively continues the delay of compensation to petitioners indefinitely and most likely permanently.

The West Virginia Supreme Court of Appeals' ruling denies petitioners their specific rights to due process and equal protection of the law as guaranteed by the Fourteenth Amendment of the United States Constitution. The West Virginia Supreme Court made their decision under color of West Virginia Code § 56-6-12, which sets out the general standards of qualification of jurors relating to interest or bias toward the action at hand. Though the law is specific that

one who claims to have been denied a fair trial because the jury was interested or bias must carry the burden of that assertion. United States ex rel. Darcy v. Handy, supra. The West Virginia Supreme Court based their ruling of reversal of the jury verdict upon "* * * a likelihood of bias or prejudice on the part of the jury * * *." (28a.) The West Virginia Supreme Court's blatant disregard of a settled rule of law denies the petitioners due process. The due process clause not only requires just compensation for land taken, but also acts to protect the landowner from the adoption of any form of procedure in eminent domain cases which deprives the landowner of a reasonable opportunity to be heard and to present such objections and claims as he is under law entitled to make. Slattery Company v. United States, (C.A. 5 La.) 231 F.2d 37 (1956). The West Virginia Supreme Court has fashioned a rule which prevents the petitioners from attaining a jury verdict on the amount of just compensation due. The Court referred

repeatedly to the fact that some of the prospective jurors knew the petitioners and/or the potential witnesses for appraisal of petitioners' land, apparently ignoring the facts pointed out by petitioners in their brief that Braxton County is a sparsely populated rural area where the petitioner, E. L. Fisher, M.D., was born and practiced medicine for more than 40 years. Since West Virginia Code § 54-2-1 specifically provides that trials for eminent domain proceedings to be held in the circuit court in the county where the land was taken, the standard of the West Virginia Supreme Court is an impossible one for petitioners and other well-known persons in a rural community to bear. This effectively denies petitioners their right to a jury trial under West Virginia Code § 54-2-1, as well as their right to not be deprived of their property without due process of law. The rationale of West Virginia Code § 54-2-1, which requires that eminent domain cases be tried in the circuit court where the property lies is based upon the common

sense that persons in and around the community who will be called to jury duty will be familiar with the land and the properties testified to as comparable; and, thus better able to assess its true value. It is highly unlikely that the Legislature contemplated that such a jury would be familiar with the land and yet be totally without knowledge or acquaintance of the landowner. Not only does the West Virginia Supreme Court's decision in effect disregard the mandate of West Virginia Code § 54-2-1, it further acts to deprive petitioners of the fundamental safeguards which the law has set up through this statute. In Slattery Company v. United States, supra, the court held that the commission which was to decide the amount of just compensation denied the appellant therein due process of law by determining the amount of damage due by an unguided, unregulated and arbitrary opinion; rather than determining just compensation under the settled rule of law. In the instant case, the West Virginia Supreme Court has promulgated

a new standard of jury qualification; to-wit: rather than following the well-settled rule of law that any bias or interest must be shown, the court decided to speculate that there was a likelihood and base its decision upon that speculation. The Slattery case is replete with warnings that, in this period of great governmental expansion of streamlining procedures for ease of eminent domain powers, there is an alarming attitude of complacency at the extent of power the government has by which all that a man has can be taken from him by force. Therefore, petitioners urge this Court to closely adhere to the principles of the due process clause which, in addition to its requirement of just compensation, also "protects the landowner from the adoption of any form of procedure in eminent domain cases which deprives him of a reasonable opportunity to be heard and so to present such objections and claims as he is entitled to make." State ex rel. City of St. Louis v. Beck, 333 Mo. 1118, 63 S.W.2d 814, 92 A.L.R. 373

(1933). The small population of the county where the land is situated, coupled with the prominence of a doctor who has lived and practiced medicine in the community for over 40 years, makes it impossible for a jury to be empaneled with persons from the county who would not know petitioners and/or any of their witnesses. The petitioners' situation and the West Virginia Supreme Court's ruling combine to cause a denial of equal protection under the law without any rational basis or necessary State interest. The West Virginia Supreme Court's decision is a facade decrying fairness when, in actuality, it operates as a protective mechanism to keep the State coffers full, and the landowners in court. The decision was fashioned to fit the instant case and serve the State while trampling the rights of the individual petitioners.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted, and the judgment of the Supreme Court of Appeals of West Virginia reviewed and the injustice and denial of petitioners' constitutional rights created thereby corrected.

Respectfully submitted,

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APPENDIX A

ORDER OF THE WEST VIRGINIA SUPREME COURT OF APPEALS, REVERSING JUDGMENT OF THE CIRCUIT COURT OF BRAXTON COUNTY, WEST VIRGINIA, AND REMANDING CASE FOR NEW TRIAL. (Filed--March 22, 1982)

NO. 15379

WEST VIRGINIA DEPARTMENT OF HIGHWAYS, A CORPORATION, AND CHARLES L. MILLER, WEST VIRGINIA COMMISSIONER OF HIGHWAYS

v.

E. L. FISHER AND ANNA MARGARET FISHER, HUSBAND AND WIFE

Braxton County **Reversed and remanded**

McHugh, Justice

1. "The true test as to whether a juror is qualified to serve on the panel is whether without bias or prejudice he can render a verdict solely on the evidence under the instructions of the court." Syl. pt. 1, State v. Wilson, 157 W. Va. 1036, 207 S.E.2d 174 (1974).

2. Where a physician-patient relationship exists between a party to litigation and a prospective juror, although such prospective juror is not disqualified per se, special care should be taken by the trial judge to ascertain, pursuant to W. Va. Code, 56-2-12 (1931), that such prospective juror is free from bias or prejudice.

3. In an eminent domain action, although all prospective jurors stated that they could return a verdict free from bias or prejudice, where the record indicates that 13 prospective jurors were acquainted with the landowners and/or their appraisal witnesses, which witnesses testified at trial, and, of the petit jury selected from those prospective jurors, six jurors were acquainted with the landowners and/or such appraisal witnesses, a likelihood of bias or prejudice on the part of the jury existed sufficient to require that the verdict of the jury be set aside and a new trial awarded.

McHugh, Justice:

This action is before this Court upon the petition of the West Virginia Department of Highways (hereinafter "appellant"), and the commissioner of that department, for an appeal from the final order of the Circuit Court of Braxton County, West Virginia. Specifically, the appellant appeals to this Court from a verdict in the amount of $841,900 returned by a jury in favor of the appellees, E. L. Fisher and Anna Margaret Fisher, husband and wife. That verdict resulted from an eminent domain proceeding instituted by the appellant in circuit court. This Court has before it the petition for appeal, all matters of record, including a transcript of the trial in this matter, and the briefs and argument of counsel.

The appellee, E. L. Fisher, is a physician and has practiced medicine in Braxton County for more than 40 years. During the period in question, the appellees were the owners of a cattle

farm in excess of 500 acres in Braxton County, West Virginia. That land fronted on U.S. Route 19 and W. Va. Route 4 and was located near Flatwoods, West Virginia. Pursuant to the construction of Interstate 79 through West Virginia, the appellant acquired, by eminent domain, right-of-ways and easements over approximately 80 acres of the appellees' property. That taking resulted in the construction of the Flatwoods interchange to Interstate 79.

The date of the taking of the appellees' property by the appellant was April 29, 1970, as designated by order of the circuit court pursuant to the eminent domain procedures outlined in W. Va. Code, 54-2-1, et seq. On August 19, 1970, a hearing was held before condemnation commissioners. Both the appellant and the appellees filed exceptions to the award of the commissioners, and a jury trial in circuit court resulted.

On August 4, 1980, a circuit court jury was selected by counsel for the parties. On September 10, 1980, however, that jury was discharged as the result of a mistrial, and new jury selection began on September 11, 1980. Trial then began, and on September 19, 1980, the jury returned its verdict compensating the appellees in the amount of $841,900 for the taking of their land. The circuit court entered judgment upon the jury verdict, and by order entered December 3, 1980, denied the appellant's post-trial motion. It is from the final order of the Circuit Court of Braxton County that the appellant appeals to this Court.

A substantial difference of opinion existed in this action with respect to the amount of compensation to which the appellees were entitled for the taking of their property. The appellees asserted that they were entitled to in excess of one million dollars for the taking. On the other hand, the

appellant asserted that $38,500 was fair and just compensation for the taking.

During the trial, the appellee, Dr. Fisher, was called as a witness. He testified that his property taken by the appellant for highway construction had a fair market value in April, 1970, of $1,506,830. Furthermore, Dr. Fisher testified that the damage to the residue of his property was $196,970. Therefore, Dr. Fisher asserted that he was entitled to a total of $1,703,800 as fair and just compensation for the taking of his property by the appellant.[1] During his testimony, Dr.

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[1]The law in this State is that in condemnation proceedings, a landowner may express his opinion concerning the value of his land. West Virginia Department of Highways v. Sickles, W. Va. ___, 242 S.E.2d 567, 570 (1978); Tennessee Gas Transmission Company v. Fox, 134 W. Va. 106, 114, 58 S.E.2d 584, 590 (1950); Syl. pt. 1, Clay County Court v. Adams, 109 W. Va. 421, 155 S.E. 174 (1930). In West Virginia Department of Highways v. Sickles, supra, we stated as follows: "Our law has long recognized the admissibility of a

Fisher divided the property into categories based upon the characteristics of the property. Based upon those categories, values per acre were assigned to the property.

The appraisal witnesses who testified on behalf of the appellees were Harry Kyer and Wallace H. Hefner, Jr. At the time of trial, Kyer had been in the real estate business for six or seven years, and Hefner was a loan officer in a bank. Both witnesses were familiar with the appellees' farm and during the trial discussed other properties in the area.[2] Neither witness, however, based his appraisal of the

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landowner's opinion concerning the value of his land." 242 S.E.2d at 570.

[2]In Tennessee Gas Transmission Company v. Fox, 134 W. Va. 106, 58 S.E.2d 584 (1950), the landowners, during an eminent domain trial, called two witnesses, Brady and Frazier, to testify with respect to the value of the property in question. In that action, Brady had had some experience in appraising real estate, and Frazier was acquainted with land values in the area.

property in question upon the sales of comparable property. Specifically,

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Although both Brady and Frazier had seen the property in question, neither witness knew of any real estate sales in the locality. 58 S.E.2d at 587. This Court held in Tennessee Gas Transmission Company that those witnesses were sufficiently qualified to testify upon behalf of the landowners concerning the property. Specifically, we held in syllabus points 1 and 2 in that case as follows:

> 1. A witness in a proceeding in eminent domain who is acquainted with the land involved, or who has recently visited and examined it and is familiar with the market value of other lands in the same locality, or who owns and has lived upon the land, is sufficiently qualified to give his opinion of its market value. The opinion evidence of a witness so qualified is admissible but its weight and its credibility are questions for the jury.
>
> 2. The determination of the qualifications of a witness to give his opinion of the market value of land involved in a proceeding in eminent domain rests in the sound discretion of the trial

Hefner testified that there was no property in the area that was, in fact, comparable to the appellees' property.

Kyer appraised the property of the appellees taken by the appellant at $1,707,420, with damage to the residue in the amount of $355,590. According to Kyer, therefore, the appellees were entitled to a total sum of $2,063,010 for the taking of their land. Hefner valued the property taken at $20,000 per acre for a total amount due the appellees of approximately, $1,600,000.

The appraisal witness for the appellant was Harold Wingate. Wingate had been a real estate appraiser for 25 years. Wingate had experience in appraising various tracts of land in Braxton County and first examined the appellees' land in 1967. As did the

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court, and such discretion, though subject to review, will not be disturbed unless its abuse is clearly shown.

appellees, Wingate divided the appellees' property into various categories based upon the characteristics of that property. Upon the basis of those categories, Wingate assigned values per acre with respect to the property taken. Wingate concluded that $38,500 was fair and just compensation as of April 29, 1970, for the taking of the appellees' property by the appellant. Wingate further concluded that the construction of Interstate 79 resulted in an increase in value of the residue of the appellees' property beyond any damage sustained. Wingate stated during the trial that in arriving at the $38,500 figure, he considered sales of land in the area he believed to be comparable to the land of the appellees. Those sales included the sale of 84 acres in March, 1966, the sale of 57 acres in November, 1966, and the sale of 4.77 acres in August, 1966.

As the petition for appeal indicates, the appellant asks this Court to reverse the final order of the

circuit court and grant a new trial. As a ground for relief, the appellant contends that many prospective jurors, from which the petit jury was selected, were personally acquainted in a social or business manner with the appellees and their witnesses. Therefore, the appellant contends that its motion to dismiss all 20 perspective jurors for cause and its motion for a change of venue should have been granted. The appellant contends that the jury was not fair and impartial and that the verdict for the appellees was excessive. The appellant further contends that certain instructions given by the circuit court were improper. The contentions of the appellant will be combined where appropriate for purposes of discussion.

The principal ground for relief asserted by the appellant before this Court concerns the 20 prospective jurors and the petit jury drawn from those prospective jurors. It is undisputed that many prospective jurors were personally acquainted with the appellees

and their witnesses. That connection between the prospective jurors and the appellees was based upon the fact that appellee, E. L. Fisher, was born in Braxton County and practiced medicine in that county in excess of 40 years. During the voir dire examination, testimony was elicited, for example, to the effect that Dr. Fisher treated the parents of one prospective juror, delivered another prospective juror at birth and delivered the children of a third prospective juror.

At the beginning of the trial of this action, a general voir dire examination was conducted in open court. Thereafter, an individual voir dire examination was conducted in chambers. The appellant's motion to dismiss all 20 prospective jurors for cause and the appellant's motion for a change of venue were denied.

As indicated by the statements of the prospective jurors made in open court and in chambers, nine prospective

jurors were acquainted with the appellees. Ten of the prospective jurors, including six of those who knew the appellees, were acquainted with one of the other of the appellees' appraisal witnesses, Harry Kyer and Wallace Hefner. An analysis of all prospective jurors reveals that 13 prospective jurors out of 20 knew the appellees and/or certain witnesses for the appellees. See n. 3, infra. Furthermore, another appraisal witness for the appellees, Jack Butler, was not called to testify during the trial. Four of the prospective jurors, including those who were acquainted with the appellees or Harry Kyer or Wallace Hefner, were acquainted with Mr. Butler.[3]

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[3]The prospective jurors, number one through twenty for purposes of this discussion, testified as indicated below during the individual voir dire examinations in chambers. Prospective juror number one stated that, although it had been 10 years since she was treated by Dr. Fisher, Dr. Fisher was her parent's physician. Furthermore,

Subsequent to the voir dire examinations, the petit jury was selected. Six members of the jury were acquainted with the appellees and/or Mr. Kyer or Mr. Hefner. Another juror was acquainted with Mr. Butler. As indicated above, Mr. Butler did not testify.

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that prospective juror owned cattle jointly with Wallace Hefner, an appraisal witness for the appellees. That prospective juror did not serve upon the petit jury. Prospective juror number two stated that she knew neither the appellees not their appraisal witnesses. That prospective juror served upon the petit jury. Prospective juror number three stated that she was acquainted with appellee's appraisal witness, Wallace Hefner. Specifically, that prospective juror conducted business at the bank at which Hefner was an employee. That prospective juror did not know the appellees, and she did not serve upon the petit jury. Prospective juror number four stated that Dr. Fisher delivered him at birth. That prospective juror did not serve upon the petit jury. Prospective juror number five stated that she knew neither the appellees nor their appraisal witnesses. That prospective juror did not serve upon the petit jury.

The general standards concerning the qualifications of jurors, relating

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Prospective juror number six stated that she knew Dr. Fisher because he had treated her son. Furthermore, she was somewhat acquainted with Jack Butler, an appraisal witness for the appellees who was not called to testify. That prospective juror served upon the petit jury. Prospective juror number seven was not acquainted with the appellees. That prospective juror, however, and Harry Kyer, an appraisal witness for the appellees, were members of the same committee of a political party. That prospective juror served upon the petit jury. Prospective juror number eight stated that, although she had not been treated by Dr. Fisher for twenty years, she had both a business and personal relationship with Wallace Hefner, an appraisal witness for the appellees. That prospective juror did not serve upon the petit jury. Prospective juror number nine stated that she had a doctor-patient relationship with Dr. Fisher and a business relationship with Harry Kyer, an appraisal witness for the appellees. That prospective juror served upon the petit jury. Prospective juror number ten stated that she was acquainted with Dr. Fisher and Harry Kyer, an appraisal witness for the appellees. Specifically, she indicated that Dr. Fisher was her family doctor. That prospective juror served upon the petit jury.

to such matters as whether the prospective juror has an interest in or bias toward a particular action, are provided by W. Va. Code, 56-6-12 (1931). That statute states as follows:

Prospective juror number eleven stated that she knew neither the appellees nor their appraisal witnesses. That prospective juror served upon the petit jury. Prospective juror number twelve indicated that Dr. Fisher was his family physician. Further, that prospective juror stated that he had a personal relationship with Wallace Hefner, an appraisal witness for the appellees, and Jack Butler, an appraisal witness for the appellees who was not to called to testify. That prospective juror did not serve upon the petit jury. Prospective juror number thirteen stated that she had a doctor-patient relationship with Dr. Fisher and a business relationship with Harry Kyer, an appraisal witness for the appellees. That prospective juror served upon the petit jury. Prospective juror number fourteen stated that she once rented from Jack Butler, an appraisal witness for the appellees who was not called to testify. She did know the appellees or their other appraisal witnesses. That prospective juror served upon the petit jury. Prospective juror number fifteen stated that he did not know the appellees. He

> "Either party in any action or suit may, and the court shall on motion of such party, examine on oath any person who is called as a juror therein, to know whether he is a qualified juror, or is related to either party, or has any interest in the cause, or is sensible of any bias or

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was acquainted, however, with Wallace Hefner, an appraisal witness for the appellees, and Jack Butler, an appraisal witness for the appellees who was not called to testify. That prospective juror did not serve upon the petit jury.

Prospective juror number sixteen indicated that she did not know the appellees' appraisal witnesses. However, she knew appellee, Anna Margaret Fisher, and she considered Dr. Fisher to be her family physician. Specifically, Dr. Fisher delivered her children at birth. That prospective juror served upon the petit jury. Prospective jurors number seventeen and eighteen knew neither the appellees nor their appraisal witnesses. Prospective juror number nineteen stated that, although he did not know Dr. Fisher, he was acquainted with Harry Kyer, an appraisal witness for the appellees. That prospective juror did not serve upon the petit jury. Prospective juror number twenty knew neither the appellees nor their appraisal witnesses. That prospective juror served upon the petit jury.

prejudice therein; and the party objecting to the juror may introduce any other competent evidence in support of the objection; and if it shall appear to the court that such person is not a qualified juror or does not stand indifferent in the cause, another shall be called and placed in his stead for the trial of that cause. And in every case, unless it be otherwise specially provided by law, the plaintiff and defendant may each challenge four jurors peremptorily."

In eminent domain actions, members of the jury are required to be freeholders. W. Va. Code, 54-2-10 (1967).

In addition to that statute, standards concerning juror qualification have developed through case decision. In State v. Hatfield, 48 W. Va. 561, 37 S.E. 626 (1900), this Court held in syllabus point 1 as follows: "The object of the law is, in all cases in which juries are impaneled to try the issue to secure men for that responsible

duty whose minds are wholly free from bias or prejudice either for or against the accused, or for or against either party in civil cases." Similarly, in State v. Wilson, 157 W. Va. 1036, 207 S.E.2d 174 (1974), this Court held in syllabus point 1 as follows: "The true test as to whether a juror is qualified to serve on the panel is whether without bias or prejudice he can render a verdict solely on the evidence under the instructions of the court." Moreover, we have recognized that the mere statement of a prospective juror that he or she is not biased with respect to a particular cause may not be sufficient for the trial court to conclude that no such bias exists. As we stated in State v. Pendry, ___ W. Va. ___, 227 S.E.2d 210, 217 (1976), overruled in part on other grounds, Jones v. Warden, West Virginia Penitentiary, ___ W. Va. ___, 241 S.E.2d 914, 916-917 (1978):

> "It may not always be sufficient merely to ask a juror whether he is sensible of any bias or prejudice and

> to accept either his denial or claim of bias or prejudice merely because he says it. The existence of bias or prejudice or other lack of qualification is addressed in the first instance to the trial court. Although the juror's opinion is entitled to consideration, it need not always be taken to be conclusive. It may frequently become necessary for the trial court or counsel to go into particular matters which may be the subject of biased or prejudiced views in order to determine whether the juror in fact, even without his own knowledge, may have a demonstrable bias or prejudice which would operate to the disadvantage of one of the litigating parties."

Usually, the determination of whether a juror may be biased or prejudiced is left to the discretion of the trial judge. State v. Gargiliana, 138 W. Va. 376, 379, 76 S.E.2d 265, 267 (1953).[4]

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[4]As this Court stated in State v. Gargiliana, supra:

In Chesapeake & Ohio Railway Co. v. Smith, 103 Va. 326, 49 S.E. 487 (1905), the Supreme Court of Appeals of Virginia affirmed a judgment in favor of the plaintiff in a personal injury action filed against a railway company. The record in that action indicated that certain jurors were friends of the plaintiff and that the plaintiff was their family physician. The Virginia court nevertheless found those jurors to be qualified and in syllabus point 1 held as follows:

> "The determination of the qualifications of a juror is a problem often difficult to solve. The fact sought to be established, whether the juror may be biased or prejudiced, rests alone with the proposed juror, and often he may be unable to honestly determine whether he would be unduly influenced by certain facts or situations in consideration of evidence to be offered. Usually the answer is left to the sound discretion of the trial judge." (Citations omitted.)

76 S.E.2d at 267.

> "The fact that jurors in a civil case are friends of the plaintiff, and that he is their family physician, does not per se disqualify them from sitting in the case. The trial court must determine from all the facts before it whether or not a juror is competent. In the absence of other evidence, his statement on his voir dire that the relation would not influence his verdict is sufficient to warrant his acceptance."

103 Va. 326.

In Chesapeake & Ohio Railway Co., however, the court noted as follows: "The juror may state and honestly believe that he is free from all bias, and yet it may appear from his own or from extraneous evidence, or both, that such may not be the fact." 103 Va. at 328, 49 S.E. at 487.

In Lambert v. Sisters of St. Joseph of Peace, 277 Or. 233, 560 P.2d 262 (1977), the plaintiffs, alleging negligent medical treatment, brought an

action against a physician and others. A verdict in favor of the defendants was returned by the jury. One of the jurors, Bruce C. Brandt, had been treated by defendant physician, Dr. Degge. On voir dire, Brandt testified that he thought Dr. Degge was a good physician and that it might be hard to convince Brandt to return a verdict against Dr. Degge. On the other hand, Brandt testified that there was no reason why he could not act as a fair and impartial juror.[5]

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[5]In Lambert, supra, juror Brandt on voir dire testified in part as follows:

> "THE COURT: Now, is there anything about that relationship that you think might affect your thinking?
>
> "JUROR BRANDT: Well, I, I think Dr. Degge is a very good doctor, but as far as that, you know, that would, that would bother me.
>
> "THE COURT: Well, let me ask you this: Would you give any more credence to Dr.

In Lambert, the Court concluded that there was a substantial probability of bias on the part of juror Brandt, and, therefore, the trial court's denial of the plaintiff's challenge for cause with respect to Brandt was a manifest abuse of discretion. Accordingly, the action was remanded to the trial court for a new trial.

> Degge's testimony than you would to any other witness.
>
> "JUROR BRANDT: I don't, I don't believe I would.
>
> * * *
>
> "THE COURT: Any reason you can think of that you could not act as a fair and impartial juror?
>
> "JUROR BRANDT: No.
>
> * * *
>
> "A. [Juror Brandt] - you might have a harder time convincing me because I have had this association [with the doctor]."

560 P.2d at 264-265.

In Lambert, the court stated as follows:

> "It is not enough if a juror believes that he can be impartial and fair. The court in exercising discretion must find from all of the facts that the juror will be impartial and fair and not be biased consciously or subconsciously. A mere statement by the juror that he will be fair and afford the parties a fair trial becomes less meaningful in light of other testimony and the facts which at least suggest the probability of bias. The court in exercising discretion must be convinced that a probability of bias of the juror does not exist. The test of a juror's disqualification is the probability of bias or prejudice as determined by the court."

560 P.2d at 266.

In the action before this Court, 13 prospective jurors were acquainted with the appellees and/or their appraisal witnesses, Kyer or Hefner. The appellant, by way of preemptory challenges,

could only remove four of those 13 jurors. The petit jury selected from those prospective jurors contained six members who were acquainted with the appellees and/or witnessed Kyer or Hefner. We are not unmindful of the fact that Dr. Fisher had practiced medicine in the area in excess of 40 years and that it would be difficult in a rural county such as Braxton County to secure prospective jurors not acquainted with such a landowner or other witnesses. We hold, however, that the circuit court abused its discretion in failing to grant the appellant's motion to dismiss for cause all 20 prospective jurors. The number of prospective jurors who knew the appellees or their witnesses, or both, was substantial, and, although all prospective jurors stated that they could deliberate fairly upon the action, we are of the opinion that the appellant proceeded to trial at a serious disadvantage.

Several prospective jurors has at one time or continued to have Dr. Fisher

as their personal or family physician. The physician-patient relationship is a special relationship. Inherent in that relationship is a respect for the reliability of statements communicated between the physician and the patient. See Sutherland v. Kroger Company, 144 W. Va. 673, 110 S.E.2d 716 (1959).[6] That mutual reliability or trust ordinarily grows as the physician-patient relationship continues.

In an eminent domain action, such as the one before this Court, opinion testimony is often the primary consideration. We are of the opinion that where a physician is a party in such a

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[6]In Sutherland v. Kroger Company, supra, this Court recognized the probable reliability of the statements of a patient to his physician. In syllabus point 8 we held as follows: "It is a well recognized exception to the hearsay rule that a doctor who examines a patient for the purpose of treatment may testify as to his medical conclusions, which may be based on the history given to him by the patient with regard to subjective symptoms."

proceeding, and several prospective jurors and members of the petit jury are or were his patients, the possibility that the action cannot be resolved without prejudice should be recognized. We hold, therefore, that where a physician-patient relationship exists between a party to litigation and a prospective juror, although such prospective juror is not disqualified per se, special care should be taken by the trial judge to ascertain, pursuant to W. Va. Code, 56-6-12 (1931), that such prospective juror is free from bias or prejudice. Specifically, we hold that in an eminent domain action, although all prospective jurors stated that they could return a verdict free from bias or prejudice, where the record indicates that 13 prospective jurors were acquainted with the landowners and/or their appraisal witnesses, which witnesses testified at trial, and, of the petit jury selected from those prospective jurors, six jurors were acquainted with the landowners and/or such appraisal witnesses, a likelihood of bias or prejudice on the

part of the jury existed sufficient to require that the verdict of the jury be set aside and a new trial awarded.

We find no reversible error in this action with respect to the instructions challenged by the appellant in this appeal, and all other errors asserted by the appellant are without merit.

The final order of the Circuit Court of Braxton County is hereby reversed, and this action is remanded to the circuit court for a new trial.

Reversed and remanded.

APPENDIX B

ORDER OF THE WEST VIRGINIA SUPREME COURT OF APPEALS DENYING PETITION FOR REHEARING (Filed--May 27, 1982)

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 27th day of May, 198[illegible] the following order was made and ent[illegible]d: to-wit:

WEST VIRGINIA DEPARTMENT OF HIGHWAYS, a corporation, and CHARLES L. MILLER, West Virginia Commissioner of Highways,

Petitioners Below, Appellants,

v.

E. L. FISHER and ANNA MARGARET FISHER, husband and wife,

Defendants Below, Appellees.

The Court, having maturely considered the petition for rehearing and reargument filed in the captioned proceeding, is of opinion to, and doth hereby, deny the prayer of the petition and doth order that the final order

entered herein be made absolute and certified as heretofore directed.

A True Copy

Attest: /George W. Singleton/
Clerk Supreme Court of Appeals

APPENDIX C

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States Amendment V

No person shall be held for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nore be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of West Virginia
Article 3, Section 9

§ 9. Private property shall not be taken or damaged for public use, without just compensation; nor shall the same be taken by any company, incorporated for the purposes of internal improvement, until just compensation shall have been paid, or secured to be paid, to the owner; and when private property shall be taken, or damaged for public use, or for the use of such corporation, the compensation to the owner shall be ascertained in such manner, as may be prescribed by general law; provided, that when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders.

West Virginia Code

§ 54-1-1. Bodies which may exercise power of eminent domain.

The United States of America, the State of West Virginia, and every corporate body politic heretofore on hereafter created by the Constitution or statutes of the State, and every corporation heretofore or hereafter organized under the laws of, or authorized to transact business in, the State, for any purpose of internal improvement for which private property

may be taken or damaged for public use as authorized in section two [§ 54-1-2] of this article, shall have the right of eminent domain, and may exercise the same to the extent and in the manner provided in this chapter, and subject to the restrictions and limitations provided by law. (1931 Code, § 54-1-1.)

West Virginia Code

§ 54-2-1. Jurisdiction

In any case in which property may lawfully be taken for a public use, application may be made by petition to the circuit court or the judge thereof in vacation, of the county in which the estate is situated, to appoint commissioners to ascertain a just compensation to the owners of the estate proposed to be taken. If a tract lies partly in one county and partly in another, the application in relation thereto may be made in either county. (Code 1860, p. 324; Code 1868, c. 42, §§ 2, 3, 1875, c. 114, § 3; 1879, c. 8; 1881, c. 18; 1882, c. 150; Code 1923, c. 42, § 3.)

West Virginia Code

§ 54-2-10. Proceedings on report; trial by jury.

Within ten days after the report required by the provisions of section nine [§ 54-2-9] of this article is returned and filed, either party may file exceptions thereto, and demand that

the question of the compensation, and any damages to be paid, be ascertained by a jury, in which case a jury of twelve freeholders shall be selected and impaneled for the purpose, as juries are selected in civil actions. But no person shall sit on such jury who would not be eligible to serve as a condemnation commissioner in the proceeding. The cause shall be tried as other causes in such court, except that any person who served as a condemnation commissioner in the proceeding shall not be examined as a witness in regard to just compensation or any damages. The jury, ascertaining the damages or compensation to which the owner of the property, or interest or right therein, proposed to be taken is entitled, shall be governed by sections nine and nine-a [§§ 54-2-9, 54-2-9a] of this article except that a view of the property proposed to be taken shall not be required: Provided, that in the event a demand therefor is made by a party in interest, the jury shall be taken to view the property, and in such case, the judge presiding at the trial shall go with the jury and shall control the proceedings: Provided, however, that the value of any leasehold on the property proposed to be taken, that must be paid by the owner thereof to his tenant or tenants, shall be admissible in evidence in any hearing before the condemnation commissioners or in the trial by jury.

If no exceptions be filed to such report, and neither party demand a trial by jury as aforesaid, the court, or the

judge thereof in vacation, unless good cause be shown against it, or it be defective or erroneous on its face, shall confirm such report, and order it to be recorded in the proper order book of the court. (Code 1849, c. 56; Code 1860, c. 56; Code 1868, c. 42, § 17; 1875, c. 114, § 18; 1881, c. 18; Code 1923, c. 42, § 17; 1963, c. 65; 1967, c. 76.)

West Virginia Code

§ 56-6-12. Qualifications of jurors; examination on voir dire; peremptory challenges.

Either party in any action or suit may, and the court shall on motion of such party, examine on oath any person who is called as a juror therein, to know whether he is a qualified juror, or is related to either party, or has any interest in the cause, or is sensible of any bias or prejudice therein; and the party objecting to the juror may introduce any other competent evidence in support of the objection; and if it shall appear to the court that such person is not a qualified juror or does not stand indifferent in the cause, another shall be called and placed in his stead for the trial of that cause. And in every case, unless it be otherwise specifically provided by law, the plaintiff and defendant may each challenge four jurors peremptorily. (1852-3, c. 27, § 23; Code 1860, c. 162, § 21; Code 1868, c. 116, § 17; 1872-3, c. 47, § 23; 1882, c. 83, § 17; 1890, c.

11, § 17; 1891, c. 42, § 17; Code 1923, c. 116, § 17.)